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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. [redacted] 70

ALGONQUIN GAS TRANSMISSION COMPANY and TEXAS EASTERN TRANSMISSION CORPORATION,

Petitioners,

v.

NORTHEASTERN GAS TRANSMISSION COMPANY, TENNESSEE GAS TRANSMISSION COMPANY, FEDERAL POWER COMMISSION, BLACKSTONE VALLEY GAS AND ELECTRIC COMPANY and FALL RIVER GAS WORKS COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 781.

ALGONQUIN GAS TRANSMISSION COMPANY and TEXAS EASTERN TRANSMISSION CORPORATION,

Petitioners,

v.

NORTHEASTERN GAS TRANSMISSION COMPANY, TENNESSEE GAS TRANSMISSION COMPANY, FEDERAL POWER COMMISSION, BLACKSTONE VALLEY GAS AND ELECTRIC COMPANY AND FALL RIVER GAS WORKS COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Algonquin Gas Transmission Company (Algonquin) and Texas Eastern Transmission Corporation (Texas Eastern), parties by intervention in the proceedings below, pray that a writ of certiorari be issued to review the four judgments of the Court of Appeals for the Third Circuit, which were entered on April 4, 1952, with respect to certain orders of the Federal Power Commission (Commission) and remanding the proceedings to the Commission for further hearings.

Opinions Below.

The opinions of the Commission are as follows: Opinion No. 201, dated October 3, 1950 (R., Vol. I, pp. 84-93); Opinion No. 202, dated November 4, 1950 (R., Vol. I, pp. 94-133); Opinion No. 206, dated February 26, 1951 (R., Vol. I, pp. 134-184); and Opinion No. 208, dated March 1, 1951 (R., Vol. I, pp. 185-210).

The opinion of the United States Court of Appeals for the Third Circuit (R., Vol. VII, p. 1571) is not yet officially reported.

Jurisdiction.

Each of the judgments of the United States Court of Appeals for the Third Circuit was entered on April 4, 1952 (R., Vol. VII, pp. 1587-93). The jurisdiction of the Supreme Court is invoked under Sec. 19(b) of the Natural Gas Act (15 U. S. C. 717r(b)) and under 28 U. S. C. 1254(1).

Questions Presented.

Northeastern Gas Transmission Company (Northeastern) and Algonquin filed with the Federal Power Commission competitive applications to transport and sell natural gas in New England (R., Vol. II, pp. 442a, 471a). After a consolidated hearing of these applications, the Commission granted Northeastern's application in part and denied the remainder, and then determined that Algonquin should serve certain gas distributing companies in New England upon establishing its gas supply (R., Vol. I, p. 94). Thereafter, when only one day remained for the conclusion of the hearing on Algonquin's application, Northeastern filed a second application to serve the same areas which the Commission had determined should be served by Algon-

quin (R., Vol. III, p. 673a). The Commission found that this second application was untimely filed and also that Northeastern had previously had a full opportunity to be heard on the issues involved in its second application, and accordingly dismissed it without a hearing (R., Vol. I, pp. 207-208). The Court of Appeals held that this was error and that a certificate could not be granted Algonquin without first hearing Northeastern's second application (R., Vol. VII, pp. 1578-9, 1584-6). The questions presented are:

(1) Whether the rule announced by the Supreme Court of the United States in *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U. S. 327 (1945), requires that the decision on an application for a certificate of public convenience and necessity be held up until a hearing is held on a competitive application which is filed near the conclusion of the hearing on the earlier application, or whether a Federal administrative agency has the right to determine that there has been an untimely filing of the later competitive application and that it is not in the public interest to defer decision on the earlier one.

(2) Whether Sec. 7(c) of the Natural Gas Act, as amended, which provides that upon the filing of an application for a certificate of public convenience and necessity the matter shall be set for hearing, requires that a hearing be held on an application which the Commission finds is untimely filed near the conclusion of the hearing on a competitive application.

(3) Whether the rule announced by the Supreme Court of the United States in *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U. S. 327 (1945), requires that the decision of a Federal administrative

agency on an application for a certificate of public convenience and necessity be held up until there has been a hearing on a second competitive application filed by an applicant when the administrative agency finds that such applicant, in a consolidated hearing previously held on its first application and the application of its competitor, has already had a full opportunity to be heard on the issue of service to the markets involved in its second application.

(4) Whether Sec. 7(c) of the Natural Gas Act, as amended, requires the Commission to grant an applicant a hearing on a second application to serve certain markets when the Commission finds that such applicant has previously had a full opportunity to be heard on the issue of service to such markets in the consolidated hearing held on its first application and on the application of its competitor.

(5) Whether the decision of the Supreme Court of the United States in *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U. S. 572 (1950), which upheld the action of the Board in the assignment to an applicant of markets that were not within the purview of the specific authorization sought in its application, is applicable to a case, such as the present one, in which applicants seek the assignment of specific distributors in the same general area and to serve such other communities as constitute a potential market for their pipe line systems.

Statute Involved.

The pertinent provisions of the Natural Gas Act of 1938 (52 Stat. 821, as amended by 56 Stat. 83 (1942), 15 U. S. C. 717 *et seq.*) are set forth in the Appendix, *infra*, pp. 31-34.

Statement.

On August 24, 1949, Northeastern, a wholly owned subsidiary of Tennessee Gas Transmission Company (Tennessee), filed with the Commission in Docket No. G-1267 an application under Sec. 7(c) of the Natural Gas Act, as amended, for a certificate of public convenience and necessity for authority to construct and operate a new pipe line system in New England (R., Vol. II, p. 327a). Northeastern requested authority in such application, as amended on March 2, 1950, to serve certain specific gas distributing companies in Massachusetts, Connecticut, Rhode Island, and New Hampshire, and also to serve such communities "as logically should be served by the pipe line system, and which are thus part of the potential market for that system" (R., Vol. II, p. 443a). Northeastern proposed to obtain its supply of gas from Tennessee at the New York-Massachusetts State line and from Transcontinental Gas Pipe Line Corporation (Transcontinental) at the New York-Connecticut state line.[1]

On January 24, 1950, Algonquin, organized by the owners of various New England gas companies, filed an application also under Sec. 7(c) of the Natural Gas Act, as amended, in Docket No. G-1319 for a certificate to authorize the construction and operation of a natural gas pipe line system to serve gas distributing companies in three New England States, Massachusetts, Connecticut and Rhode Island. Algonquin proposed to obtain its supply of natural gas from Texas Eastern near Lambertville, New Jersey (R., Vol. II, p. 471a). An application filed by Texas

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[1] Subsequent to the Commission's decision on Northeastern's application, Transcontinental's contract to supply Northeastern with natural gas was cancelled.

Eastern in Docket No. G-1012 sought authority to construct and operate certain facilities and to sell gas to Algonquin. In the proceeding on Northeastern's first application, Northeastern specifically sought to serve all of the gas distributing companies covered by Algonquin's application, except ten companies. In addition Northeastern offered evidence as to how it would serve all companies covered by Algonquin's application (R., Vol. V, pp. 1265a-1266a).

Tennessee and Transcontinental, which were to be Northeastern's suppliers, and Algonquin's supplier, Texas Eastern, are natural gas companies subject to the jurisdiction of the Commission under the Natural Gas Act, and they presently operate natural gas pipe lines extending from Texas to New York.

The Commission commenced holding hearings March 7, 1950 on the Northeastern application and on the applications of Tennessee and Transcontinental, which sought authority to construct facilities to supply Northeastern; and thereafter the Commission commenced the hearings on the applications of Algonquin and Texas Eastern which were subsequently consolidated for hearing with that of Northeastern, and the consolidated hearing proceeded until August 5, 1950 (R., Vol. II, p. 550a). Northeastern was an intervenor and participated fully in the hearing on the applications of Algonquin and Texas Eastern, and Algonquin was an intervenor in the hearing on Northeastern's application (R., Vol. II, pp. 456a, 394a).

By October 4, 1950, the evidence in the consolidated proceedings was concluded except as to Algonquin's gas supply which was to be incorporated by reference from the record in Texas Eastern's case, and the entire record was before the Commission for its consideration (R., Vol. I, p. 85). It is admitted by Northeastern that by then both applicants

had had complete hearings on all competitive aspects of their respective applications (R., Vol. II, pp. 594a, 596a). On October 4, 1950 the Commission issued its Opinion No. 201, in which it found that the record conclusively demonstrated the need for natural gas in New England, but that neither Northeastern nor Algonquin had proposed projects which would meet the public demand for natural gas in New England in the early future, and the Commission invited the two applicants to present "without delay a proposal based upon evidence now of record which will meet the public demand" (R., Vol. I, p. 90). The Commission stated that it was prepared to reopen the record for supplementary evidence if necessary (R., Vol. I, p. 90).

Pursuant to Opinion No. 201, Northeastern submitted its proposal in which it requested that all of New England be established as its service area and that the application of Algonquin be denied (R., Vol. III, p. 629a). Algonquin submitted its proposal in the form of a supplement to its amended application, in which it set out as alternatives: first, that the New England market be divided between Northeastern and Algonquin in accordance with evidence that had been offered by the Staff of the Commission during the course of the hearing,[2] or second, that Algonquin be authorized to serve the entire New England area (R., Vol. III, p. 632a).

On November 8, 1950, the Commission made its decision on this controversy in Opinion No. 202, in which it determined the issue between the two rival applicants with respect to service of natural gas in the New England area (R., Vol.

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[2] See evidence offered by the Staff of the Commission as a suggested basis for dividing the markets between Northeastern and Algonquin. (Witnesses: Sullivan, Kallina, and O'Connor. R., Vol. V, pp. 1282(2)a-1282(74)a; Exhibits 397-413, R., Vol. IV, pp. 1036a-1062a).

I, p. 94).[3] The Commission rejected the two proposals and found that the issuance of a certificate to either applicant as applied for would render the other applicant's project infeasible. The Commission concluded that it would better serve the public interest to have two wholesale natural gas systems in New England which would be feasible and that there would be a fair and equitable division of the markets with a minimum of duplication of facilities (R., Vol. I, p. 107). Northeastern was authorized to serve thirty-seven distributing systems, including certain companies which Algonquin had sought authority to serve, and the remainder of Northeastern's application was denied. Northeastern, complying with a condition of the Order, advised the Commission in writing that it accepted the certificate (R., Vol. III, p. 645a).

In denying the remainder of Northeastern's application in Opinion No. 202, the Commission denied Northeastern's request for authority to serve seventeen distributing companies which Northeastern had specifically sought authority to serve, and then the Commission found that these seventeen companies, together with nine other distributing companies, would afford a market for Algonquin which would support an economically feasible project that would be in the public interest (R., Vol. I, pp. 107-109). The Commission did not at that time grant a certificate to Algonquin as it was necessary for Algonquin to conclude its case by completing its gas supply evidence (R., Vol. I, p. 109).

In the meantime, Texas Eastern had proceeded with the hearing on its application in Docket No. G-1012. On Decem-

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[3] The competitive aspects of the applications of Algonquin and Northeastern as presented to the Commission prior to Opinion No. 202 are shown in the map, Exhibit No. 1 to this petition. The results of the Commission's action in Opinion No. 202 in dividing the markets between the applicants are shown in the map, Exhibit No. 2 to this petition.

ber 21, 1950, only one day remained for the conclusion of the hearings on the Algonquin and Texas Eastern applications, which were set for January 15, 1951; and on this day December 21, 1950, Northeastern filed its application in Docket No. G-1568, in which it sought authority to serve the twenty-six distributing companies, which the Commission had determined in Opinion No. 202 should be served by Algonquin, and certain other communities not involved here (R., Vol. III, p. 673a). On December 29, 1950, Northeastern filed a supplement to its petition of intervention in the proceeding involving Texas Eastern's application in Docket No. G-1012 and requested the Commission to require Texas Eastern to sell it 60,000 MCF of natural gas per day in the event its application was granted in Docket No. G-1568 (R., Vol. III, p. 687a). On January 8, 1951, Northeastern filed a motion with the Commission requesting that its new application be consolidated with the application of Algonquin (R., Vol. III, p. 727a).

On January 10, 1951 the Commission dismissed Northeastern's second application in so far as it sought authority to serve communities covered by Algonquin's application and also dismissed the supplement to Northeastern's petition of intervention in Texas Eastern's case (R. Vol. I, pp. 61, 79). The dismissal of such supplement, however, did not affect Northeastern's continued participation as an intervenor in the Texas Eastern proceeding in which the matter of gas supply was to be determined. The Commission found that Northeastern's second application and its supplement to the petition of intervention were untimely filed, that Northeastern had previously had a hearing on the issue of service to such communities and that a consolidation of Northeastern's second application with that of Algonquin "would have unduly delayed the service of natural gas to many New England communities and would

have been contrary to the public interest'' (R., Vol. I, pp. 207-208). On January 10, 1951 the Commission also dismissed the Northeastern and Tennessee petitions of intervention in Algonquin's case since the competitive issue between these companies had been decided by Opinion No. 202 (R., Vol. I, pp. 76-77).

The hearing on the Algonquin and Texas Eastern applications was concluded on January 15, 1951, and on February 27, 1951, the Commission issued its Opinion No. 206 granting a certificate of public convenience and necessity to Algonquin to serve the twenty-six gas distributing companies which had been found in the Commission's Opinion No. 202 to be a feasible system for Algonquin, and authorizing Texas Eastern to sell and deliver natural gas to Algonquin (R., Vol. I, p. 134).

Northeastern and Tennessee filed a joint petition for review in the Court of Appeals for the Third Circuit with respect to the Commission's dismissal orders of January 10, 1951, and later, Northeastern and Tennessee filed another joint petition for review with such Court complaining of the order entered by the Commission granting Algonquin a certificate and authorizing Texas Eastern to sell natural gas to Algonquin (R., Vol. I, pp. 1, 211).

In the order accompanying Opinion No. 206, the Commission authorized Algonquin to supply natural gas to Blackstone Valley Gas and Electric Company (Blackstone) and Fall River Gas Works Company (Fall River) (R., Vol. I, pp. 174-175). In Opinion and Order No. 202, the Commission had denied to Northeastern authority to serve these two gas distributing companies and no appeal was taken by Northeastern or these two companies from that order (R., Vol. I, pp. 111, 129). Blackstone and Fall River filed separate petitions for review in the Court of Appeals for the Third Circuit with respect to the order authorizing

Algonquin to supply them with natural gas (R., Vol. I, pp. 283a, 293a).

All four of these petitions for review were consolidated for briefing and oral argument in the Court of Appeals, and Algonquin and Texas Eastern were permitted to intervene in those proceedings. That Court rendered its decision on April 4, 1952, in each of those four cases, and held, as stated in its opinion, that it was error for the Commission to dismiss without a hearing Northeastern's second application to serve the New England area, and also that under the rule of the *Ashbacker* case it was error for the Commission to grant Algonquin's application before hearing Northeastern's second application (R., Vol. VII, pp. 1571-87). The Court held that the three dismissal orders of January 10, 1951, and that portion of the Commission's Opinion and Order No. 206 granting a certificate to Algonquin and authorizing Texas Eastern to sell and deliver natural gas to Algonquin, should be set aside (R., Vol. VII, pp. 1586-7).

Northeastern did not at any time seek a stay of Algonquin's certificate as provided for in Section 19(c) of the Natural Gas Act, and pursuant to such certificate Algonquin commenced the construction of its pipe line system promptly after February 27, 1951 (R., Vol. VII, pp. 1621-2). At the time of the decision of the Court of Appeals on April 4, 1952, Algonquin had expended approximately $23,000,000 on such construction. During this period it had issued and sold Bonds in the principal amount of $27,600,000 and Common Stock in the amount of $9,200,000 (R., Vol. VII, p. 1622). The issuance of the mandate of the Court of Appeals has been stayed pending the filing of this petition for writ of certiorari.

Specification of Errors.

The Court of Appeals for the Third Circuit erred:

1. In holding that the Commission could not grant a certificate of public convenience and necessity to Algonquin without first hearing Northeastern's second application, which was filed in Docket No. G-1568.

2. In holding that Northeastern was entitled to a hearing under Section 7(c) of the Natural Gas Act on its second application.

3. In extending the principle announced by the Supreme Court of the United States in *Ashbacker Radio Corporation v. Federal Communications Commission*, 326 U. S. 327 (1945), and thereby holding that the Commission was required to give Northeastern a full new hearing on its second application, and was required to hold up its decision on Algonquin's application until such new hearing had been held.

4. In disregarding the finding of fact of the Commission in Opinion No. 208, which was supported by substantial evidence, that the second application of Northeastern was untimely filed.

5. In disregarding the finding of fact of the Commission in Opinion No. 208, which was supported by substantial evidence, that Northeastern previously had a full opportunity to be heard on the issues raised in its second application.

6. In disregarding the finding of fact of the Commission, which was supported by substantial evidence, that a consolidation of Northeastern's second application in

Docket No. G-1568 and the application of Tennessee in Docket No. G-1582 with Algonquin's application in Docket No. G-1319, as proposed by Tennessee and Northeastern, would have unduly delayed the service of natural gas to many New England communities and would have been contrary to the public interest.

7. In holding that the petitions of intervention of Northeastern and Tennessee in the proceeding on Algonquin's application in Docket No. G-1319 should not have been terminated.

8. In holding that the decision of the Supreme Court in *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U. S. 572 (1950) was not applicable to the action taken by the Commission in Opinion No. 202 in dividing the markets in New England between Northeastern and Algonquin.

9. In failing to hold that Northeastern in its first application, which was filed in Docket No. G-1267, sought authority to serve all of the communities which were covered by Algonquin's application in Docket No. G-1319.

10. In holding that the Commission should not have dismissed Northeastern's supplement to its petition of intervention in the Texas Eastern proceeding in Docket No. G-1012.

11. In disregarding the finding of fact of the Commission, which was supported by substantial evidence, that Northeastern's second application was a collateral attack on the Commission's Opinion and Order No. 202.

12. In failing to hold that it was without authority to review or construe the findings and determinations con-

tained in the Commission's Opinion No. 202 and accompanying order, of which no review had been sought by Northeastern and which had been permitted to become final and non-reviewable.

13. In failing to hold that Northeastern and Tennessee were estopped to attack the assignment of certain gas distributing companies to Algonquin in the Commission's Opinion No. 202.

14. In holding that Northeastern and Tennessee were not bound by the Commission's Opinion and Order No. 202 with respect to the assignment of certain gas distributing companies to Algonquin.

15. In denying the motions of the Commission to dismiss the petitions for review filed in the Court of Appeals by Blackstone and Fall River.

16. In holding that the following orders of the Commission should be set aside:

(1) The order entered in the Commission's Docket G-1568 on January 10, 1951;

(2) The order entered in the Commission's Docket G-1319 on January 10, 1951;

(3) The order entered in the Commission's Docket G-1012 on January 10, 1951;

(4) Paragraph C of the Commission's Opinion and Order No. 206 issued February 27, 1951;

and in holding that Paragraph B of the Commission's Opinion and Order No. 206 issued February 27, 1951, should be modified so as to eliminate therefrom the authorization to Texas Eastern to sell and deliver natural gas to Algonquin.

Reasons for Granting the Writ.

This case involves questions of manifest importance to the Federal administrative agencies, to the parties participating in hearings before such agencies, and to the general public which is interested in obtaining the service to be authorized by such agencies. These are questions of Federal law involving the interpretation of Secs. 7(c) and 7(e) of the Natural Gas Act and the meaning and application of two decisions of the Supreme Court, *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U. S. 327 (1945) and *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U. S. 572 (1950).

I.

The Commission made a finding that the second application filed by Northeastern near the conclusion of the hearing on Algonquin's application was untimely filed (R., Vol. I, p. 208). It also found that Northeastern had had a full hearing on all matters covered by the portion of the second application which was dismissed (R., Vol. I, p. 207). This second application was filed when only one day of hearing remained to conclude the proceeding on Algonquin's application. Despite these facts, the Court of Appeals held that Sec. 7(c) of the Natural Gas Act, as amended, required the Commission to grant Northeastern a hearing on this second application. The Court of Appeals further held that under the decision of the Supreme Court in the *Ashbacker* case, the Commission could not grant the application of Algonquin without hearing the second application of Northeastern. Accordingly, the Court of Appeals concluded that the direct effect of the provision of the Opinion and Order No. 206, which granted a certificate to Algonquin, was "to deny Northeastern its statutory hearing under

Sec. 7(c) of its own competitive and mutually exclusive application." (R., Vol. VII, p. 1586).

If the decision of the Court of Appeals is allowed to stand, it follows that applicants can file applications for certificates of public convenience and necessity near the conclusion of extended hearings on competitive applications and that the administrative agency is required to hold up the decision of such applications until the later applications are heard. This will effectively defeat the administrative process by making final decisions impossible.

It requires months of preparation in these cases in order to establish the economic feasibility of the proposed project, the financial ability of the applicant, the adequacy of the markets, and the sufficiency of the gas reserves to support the operation of the proposed gas pipe line system over a number of years. The hearings before the Commission usually require weeks and months in order to take the testimony offered by the applicant, the numerous intervenors, and the Staff of the Commission.

If an applicant can have a hearing on a second application filed near the conclusion of a hearing on a competitive application, then further applications can be filed at the conclusion of the hearing on the second application, and the hearings can be continued indefinitely and *ad infinitum*. The work of administrative agencies will become so burdensome that they will be unable to handle and conclude these hearings, with resulting irreparable injury to the applicants and intervenors in the proceedings. The general public will be injured as a result of the delay in obtaining natural gas service or other service which must be authorized by a Federal administrative agency.

This injury and delay is manifest in the present case. In the consolidated proceeding involving Northeastern's first application and Algonquin's application, hearings were

held almost continuously from March 7, 1950 to August 5, 1950, and the record comprised approximately 9,975 pages and more than 400 exhibits. There were more than one hundred intervenors in the case. The consolidated hearing on both applications was concluded on August 5, 1950, except that it was necessary for Algonquin to prove its gas supply by incorporating this evidence from the record in Texas Eastern's case in Docket No. G-1012. Two decisions (Opinions Nos. 201 and 202) were rendered by the Commission with respect to this matter prior to the filing of Northeastern's second application. In Opinion No. 201, which was rendered by the Commission on October 4, 1950, the Commission found that the record conclusively demonstrated the need for natural gas in New England (R., Vol. I, p. 84), and both Northeastern and Algonquin urged that this need was immediate and necessary in the interest of national defense (R., Vol. III, p. 680a). Thereafter, on November 8, 1950, the Commission issued its Opinion No. 202, in which it undertook to decide this controversy between the two rival applicants for service of natural gas in the New England area (R., Vol. I, p. 94). Then, on December 21, 1950, at a time when only one day remained for the conclusion of the hearing on the Algonquin and Texas Eastern applications, Northeastern filed its second application requesting authority to serve communities in New England which the Commission had denied to it in Opinion No. 202 and had determined and announced should be served by Algonquin (R., Vol. III, p. 673a). Northeastern moved that this second application be consolidated for hearing with the application of Algonquin (R., Vol. III, p. 727a). These facts alone are substantial evidence to support the finding of fact of the Commission that this second application of Northeastern was untimely filed. Despite this finding, the Court of Appeals held that

under Sec. 7(c) of the Natural Gas Act, as amended, Northeastern was entitled to a hearing on this application and that, under the principle announced by the Supreme Court in the *Ashbacker* case, a certificate could not be granted to Algonquin until this second application was heard by the Commission.

The Commission also found that Northeastern had been given a full opportunity to be heard on its first application and in opposition to the application of Algonquin, and concluded that "it cannot now thwart the expeditious disposition of its competitor's application by filing a second exclusive application" (R., Vol. I, p. 203).

The Court of Appeals committed error in disregarding the findings of fact by the Commission that Northeastern had previously been given a full opportunity to be heard on the issues involved in the second application (R., Vol. I, pp. 207-208). The statement by the Court of Appeals (R., Vol. VII, p. 1583) that it was imperative for the Commission to hear that part of Northeastern's plan in its second application relating to asserted savings in construction costs, service charges and scarce materials completely ignored the fact that such issues had already been presented by Northeastern in connection with its first application (R., Vol. III, pp. 628a-629a). Consequently, the filing of Northeastern's second application was in effect an attempt to rehear issues previously determined by the Commission in Opinion No. 202 which was permitted to become final.

The Commission dismissed the second application in so far as Northeastern sought to serve the twenty-six distributing companies which the Commission had determined in Opinion No. 202 should be served by Algonquin upon establishing its gas supply (R., Vol. I, p. 61). Seventeen of these twenty-six distributing companies were specifically covered by Northeastern's first application and it was denied the

right to serve them by Opinion No. 202. Northeastern did not seek to have this opinion reviewed pursuant to Section 19(b) of the Natural Gas Act, but it accepted in writing the certificate issued to it under the opinion. The other nine distributing companies, which were dismissed from Northeastern's second application, serve areas which are located in the vicinity of the main or lateral lines of Northeastern's proposed pipe line system as set forth in its first application. In its first application Northeastern sought to serve not only certain specific distributing companies, but "also such communities as logically should be served by the pipe line system, and which are thus part of the potential market for that system" (R., Vol. II, p. 443a). In the hearing on its first application Northeastern offered the testimony of its President to establish how it would serve all of these nine companies as well as all other gas distributing companies proposed to be served by Algonquin and to prove the cost of additional facilities which would be necessary to furnish such service (R., Vol. V, pp. 1265a-1266a). Northeastern's proposed tariff, which was offered in evidence in the hearing on its first application, establishes that it was holding itself out to serve any distribution system connecting with its pipe line system in the six New England states (Ex. 189, R., Vol. IV, p. 1036a). Further, Northeastern was an intervenor in the proceeding on Algonquin's application and participated fully in such case, both before and after Algonquin's application was consolidated for hearing with that of Northeastern.

It is recognized that Section 7(c) of the Natural Gas Act, as amended, provides that the matter shall be set for hearing and that the Supreme Court held in the *Ashbacker* case that where there are two *bona fide* mutually exclusive applications, one cannot be granted without hearing the other.

However, the Congress and the Supreme Court certainly did not intend to take from the Commission the discretion to determine whether there is a timely filing of competitive applications. Congress has vested in the Commission the right to exercise discretion in maintaining orderly proceedings by providing in the Natural Gas Act that the Commission shall perform all acts necessary or appropriate to carry out the provisions of the Act and that all hearings and proceedings shall be governed by procedure adopted by the Commission (Natural Gas Act, Secs. 15(b) and 16). Where the Commission has found, as in the present case, that an application was not timely filed and should be dismissed for this reason and that it was not in the public interest to consolidate it with the competitive application which was ripe for decision (R., Vol. I, p. 208), the courts may not set aside the action of the Commission where its findings of fact are supported by substantial evidence (Natural Gas Act, Sec. 19(b)).

All that the *Ashbacker* case decided was that "... where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him."

We find no difficulty with the rule thus stated, but it must of necessity be subject to some practical limitations and there is nothing in the case to indicate that the Supreme Court did not so intend. Various administrative agencies have concerned themselves with attempted unwarranted extensions of the rule which would have the effect of completely inhibiting Commission action. Thus, the Federal Communications Commission adopted its Rule 1.387(b) under which it will name as a party to a hearing any person who has filed a mutually exclusive application *only* if the application in question is filed at least twenty days before the date on which the hearing on the prior

application is scheduled. See also In re *Big Sioux Broadcasting Co.*, 12 F. C. C. 146 (1947). The Civil Aeronautics Board in the *West Coast Case*, 8 C. A. B. 636 (1947), refused to extend the rule of the *Ashbacker* case in such a manner that it would be compelled to hold up decision on one application until the possible effect of the granting of that application on the success of a competing proposal could be determined, and pointed out that such a procedure would render it practically impossible for the Board to dispose of applications submitted to it. See also *Southwest-West Coast Merger Application*, 3A Pike & Fischer Ad. Law 48g. 14-1 (CAB 1950) and *Southwest Renewal-United Suspension Case*, 2 Pike & Fischer Ad. Law (2d) 98 (CAB 1952). The Securities and Exchange Commission refused to consolidate applications for approval of alternative plans under the Public Utility Holding Company Act of 1935 where the motions to consolidate were made after the hearings on the first plan had been in progress for more than a year and the record was approaching completion. This action of the Securities and Exchange Commission was reviewed by the Supreme Court after its decision in the *Ashbacker* case, and the Supreme Court found no error in the procedure followed. *American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U. S. 90 (1946). See also *Kentucky Broadcasting Corp.* v. *Federal Communications Commission*, 174 F. 2d 38 (D. C. Cir. 1949).

The attempted extension of the doctrine of the *Ashbacker* case in the instant case is more extreme than any of those referred to above, for in the instant case not only was the subsequent application untimely filed but the applicant had already been given a full hearing; the sole complaint is that a new hearing was not given on a second application the entire substance of which had just been the subject of an exhaustive hearing.

The Supreme Court should determine whether, under the circumstances recited herein, the Commission has the right to dismiss an application, the subject matter of which was accorded a full hearing in a prior proceeding and which application is filed near the conclusion of the hearing on the prior competitive applications, or whether it is required, as held by the Court of Appeals in this case, to set the second matter for hearing under Section 7(c) of the Natural Gas Act and hold up the decision of the prior competitive application until the new hearing has been held.

II.

It is of importance for the future guidance of Federal administrative agencies and those whose rights are affected by the actions of such agencies for the Supreme Court to determine whether the Court of Appeals in the present case properly held that the decision of the Supreme Court in *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U. S. 572 (1950), is inapplicable to a case, such as the present one, in which the applicants seek authority to serve specific distributors in the same general area and such other communities as constitute a potential market for their pipe line systems.

In the *State Airlines* case the Supreme Court held that the Civil Aeronautics Board did not depart from the Congressional policy in awarding routes to airlines which differed markedly from those specifically detailed in the applications, and that in so doing the Board did not deny a full and fair hearing to the parties. The Court pointed out that such routes were all in the general area covered by the consolidated hearings. The Civil Aeronautics Act provides that the Board can issue a certificate authorizing the

whole or any part of the transportation covered by an application. The Natural Gas Act contains a similar provision and the Commission relied upon this provision in Opinion No. 202 when it held, "the Natural Gas Act provides that we may issue a certificate 'authorizing the whole or any part of the operation, sale, service, construction, extension or acquisition covered by the application' " (R., Vol. I, p. 109).

The extension of the rule of the *Ashbacker* case by the court below to the facts of the instant case was completely inconsistent with the decision of the Supreme Court as expressed in the *State Airlines* case. There, as here, the several applicants for certificates of convenience and necessity had requested authority to serve certain designated points. There, as here, the administrative agency consolidated the proceedings. There, as here, the administrative agency found it impossible to grant the certificates as applied for but, as here, it did allot the various points which were the subject of the consolidated hearing to the various applicants, in accordance with the agency's determination of what would best serve the public interest. The applicable portions of the statutes involved in that case and in this are practically identical. There, as here, it was plain from the record that the applicants recognized each other as potential competitive applicants in the consolidated proceedings. Under the rule of the *State Airlines* decision, therefore, it is clear that the attempt to extend the *Ashbacker* ruling to this case was wholly unwarranted, since Northeastern had had a full and fair hearing in the consolidated proceedings on all matters of substance contained in its new application with respect to which a new hearing was refused by the Commission.

However, the Court of Appeals in the instant case rejected the authority of the *State Airlines* case in the following language (R., Vol. VII, p. 1581):

> "The Commission strenuously endeavors to justify its action in allocating those ten distributors in No. 202 'even if it be concluded that the markets assigned to each of the applicants, Northeastern and Algonquin, were not within the purview of the authority sought in the applications' by citing as authority for such practice, Civil Aeronautics Board *v.* State Airlines, 338 U. S. 572. That case is of no help for it is an area decision with the awards 'all in the general area covered by the consolidated hearings.' The vital difference from that case in the matter before us is that the hearing which was held in the present issue concerned the assignment of specific distributors in the New England territory."

It is true that in the instant case the applicants sought assignment of specific distributors in the New England area but all of such distributors were in the same general area. In fact, there was considerable overlapping of the pipe line systems proposed by Algonquin and by Northeastern in its first application as shown by the map attached hereto (Exhibit 1). The term "area proceeding" as used in the *State Airlines* case is merely descriptive of a consolidated proceeding involving a number of applicants for a number of routes in the same general area and arises by virtue of the nature of the applications which create an area problem. Neither the Civil Aeronautics Act nor the rules of the Civil Aeronautics Board contain any special provisions for an "area proceeding" as such and as differentiated from an ordinary proceeding under the Act. Consequently, it is submitted that the consolidated hearing on the applications of Northeastern and Algonquin to serve the New England area can

and should be designated an "area proceeding" in the same sense as that term is used in the *State Airlines* case; and that therefore the Court of Appeals erred in holding the *State Airlines* case inapplicable because it involved an "area proceeding."

Further, Northeastern sought in its first application not only authority to serve specific distributors but also those communities which could logically be served by its pipe line system and which constituted a potential market for that system (R., Vol. II, p. 443a). It should be noted that Northeastern did not seek specific authority to serve Worcester Gas Light Company, a contract customer of Algonquin and presently Northeastern's largest customer. However, having been assigned this customer by the Commission in Opinion No. 202 pursuant to the authority of the *State Airlines* case, Northeastern elected to accept it.

From the foregoing it will be seen that the construction placed by the Court of Appeals upon the decision of the Supreme Court in the *State Airlines* case, is not justified by the facts of that case.

The construction by the Court of Appeals of the *State Airlines* case also runs counter to the general principles adopted by the Supreme Court with respect to regulation by administrative agencies of companies engaged in rendering service to the public. In *United Fuel Gas Co.* v. *Railroad Commission of Kentucky,* 278 U. S. 300, 309 (1929), the Supreme Court said:

> "The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders. This duty does not permit it to pick and choose and to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give. An important purpose

> of state supervision is to prevent such discriminations, * * *"

In *Chicago, St. P., M. & O. Ry. Co.* v. *United States,* 322 U. S. 1, 3-4 (1943), the Supreme Court said:

> "The question of law in the case is whether the Commission on its finding need for such service had power to authorize service of intermediate points not asked for by the applicant . . . It is clear that the Commission on the facts found had power to include in the authorization provision for service greater than the carrier had asked."

See also *People* Ex Rel. *New York & Queens Gas Co.* v. *McCall,* 245 U. S. 345, 351 (1917).

Since the Court of Appeals erred in not holding that the action of the Commission in dividing the markets between Northeastern and Algonquin in Opinion No. 202 was justified under the *State Airlines* case, it follows that such opinion and accompanying order constituted a final determination between these rival applicants with respect to the markets to be served by each of them in the New England area. Accordingly, the Commission was justified in dismissing on January 10, 1951, Northeastern's second application and also the petitions of intervention of Northeastern and Tennessee in the proceeding involving Algonquin's application since the issue of competition for the New England markets had been decided by the Commission in Opinion No. 202. There was no reason to permit Northeastern and Tennessee to continue in Algonquin's case and allow them to delay a determination of Algonquin's application since the competitive issue had been decided between these two rival applicants.

Northeastern and Tennessee were not injured as a result of the dismissal of their petitions of interven-

tion at a time when only one day of hearing remained in the Algonquin case for the sole purpose of permitting it to incorporate its evidence of gas supply from the record made by its supplier, Texas Eastern, in Docket No. G-1012. They continued as participants in Texas Eastern's case and had full opportunity to offer evidence and argument on this issue of gas supply, and Northeastern recognized the adequacy of such supply by requesting a supply of gas from Texas Eastern (R., Vol. III, pp. 689a-690a).

The fact that the Commission made a determination in Opinion No. 202 as to the markets to be served in New England by the two applicants before Algonquin had completed evidence of its gas supply does not affect the conclusiveness of this determination as between such parties.

In the *New England Divisions Case,* 261 U. S. 184, 201 (1923), the Supreme Court said:

> "A hearing may be a full one, although the evidence introduced does not enable the tribunal to dispose of the issues completely or permanently; and although the tribunal is convinced, when entering the order thereon, that, upon further investigation, some changes in it will have to be made. * * *"

In *Federal Power Commission* v. *Natural Gas Pipeline Co.,* 315 U. S. 575, 583-584 (1942), the Supreme Court upheld a final order of the Commission, which was issued at an interim stage of the proceedings, requiring the Company to file new tariffs which would reduce its net income by a certain amount. The Company contended that the Commission was without power to issue a final order at this stage of the proceeding. The Court said:

> "The first prerequisite to an order by the Commission is that it shall be preceded by a hearing and findings. In this case, while the proceedings were

> not ended by the interim order, the companies had full opportunity to offer all their evidence both direct and in rebuttal, and full opportunity to cross-examine every witness offered by both the Federal Power Commission and the Illinois Commerce Commission. All the evidence tendered was received and considered by the Commission, and before the interim order was entered counsel for the companies stated to the Commission that they had concluded the direct testimony in support of their case."

See also *Federal Communications Commission* v. *WJR, The Goodwill Station, Inc.*, 337 U. S. 265 (1949); *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 525 (1946); *Kuhn* v. *Civil Aeronautics Board*, 183 F. 2d 839, 842 (D. C. Cir. 1950); *National Labor Relations Board* v. *Air Associates, Inc.*, 121 F. 2d 586, 591 (2d Cir. 1941).

It is important for the Supreme Court to determine for the guidance of administrative agencies and parties affected by actions of such agencies whether the Court of Appeals has properly construed the *State Airlines* case. If the Court of Appeals was correct in its holding that the *State Airlines* case was inapplicable here, the applicability of that case is so limited that it is useless as a guide to administrative procedure. If the Court of Appeals was in error in holding that such case was inapplicable, it follows that in Opinion No. 202 the Commission properly decided the competitive issue between Northeastern and Algonquin by assigning various gas distributing companies to each of them and thereafter preventing Northeastern and Tennessee from taking any action which would thwart the expeditious disposition of Algonquin's application.

Conclusion.

It is submitted that these are important questions of Federal law which will cause confusion in the administration of the Natural Gas Act and other Acts with resulting injury to the general public unless the same are settled by the Supreme Court. For these reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Appendix.

The pertinent provisions of the Natural Gas Act of 1938, 52 Stat. 821, as amended by 56 Stat. 83 (1942), 15 U. S. C. 717 *et seq.* are as follows:

SEC. 7(c). No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to

serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. • • •

SEC. 7(e). Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. • • •

SEC. 15(b). All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter. • • •

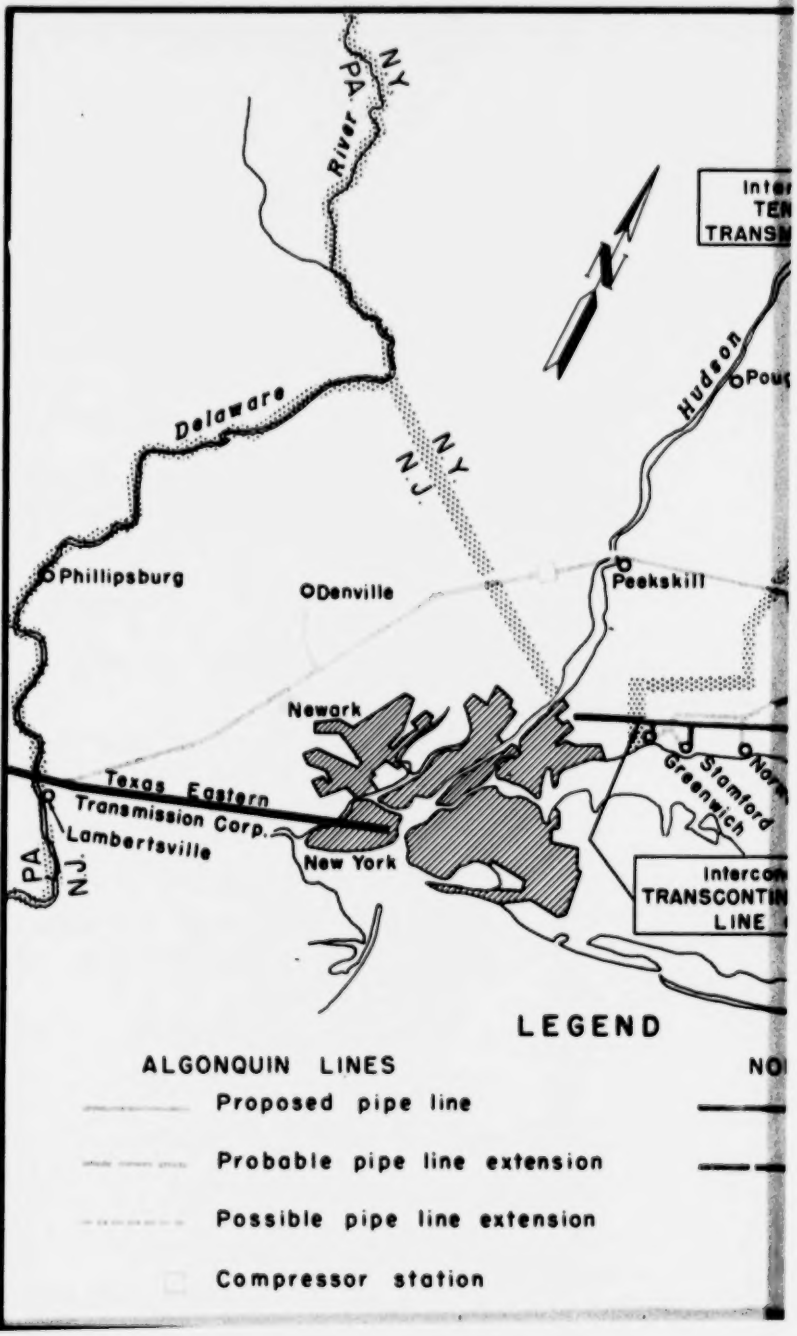
SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in

this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. * * *

SEC. 19(b). Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported

by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28. • • •

SEC. 19(c). The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. • • •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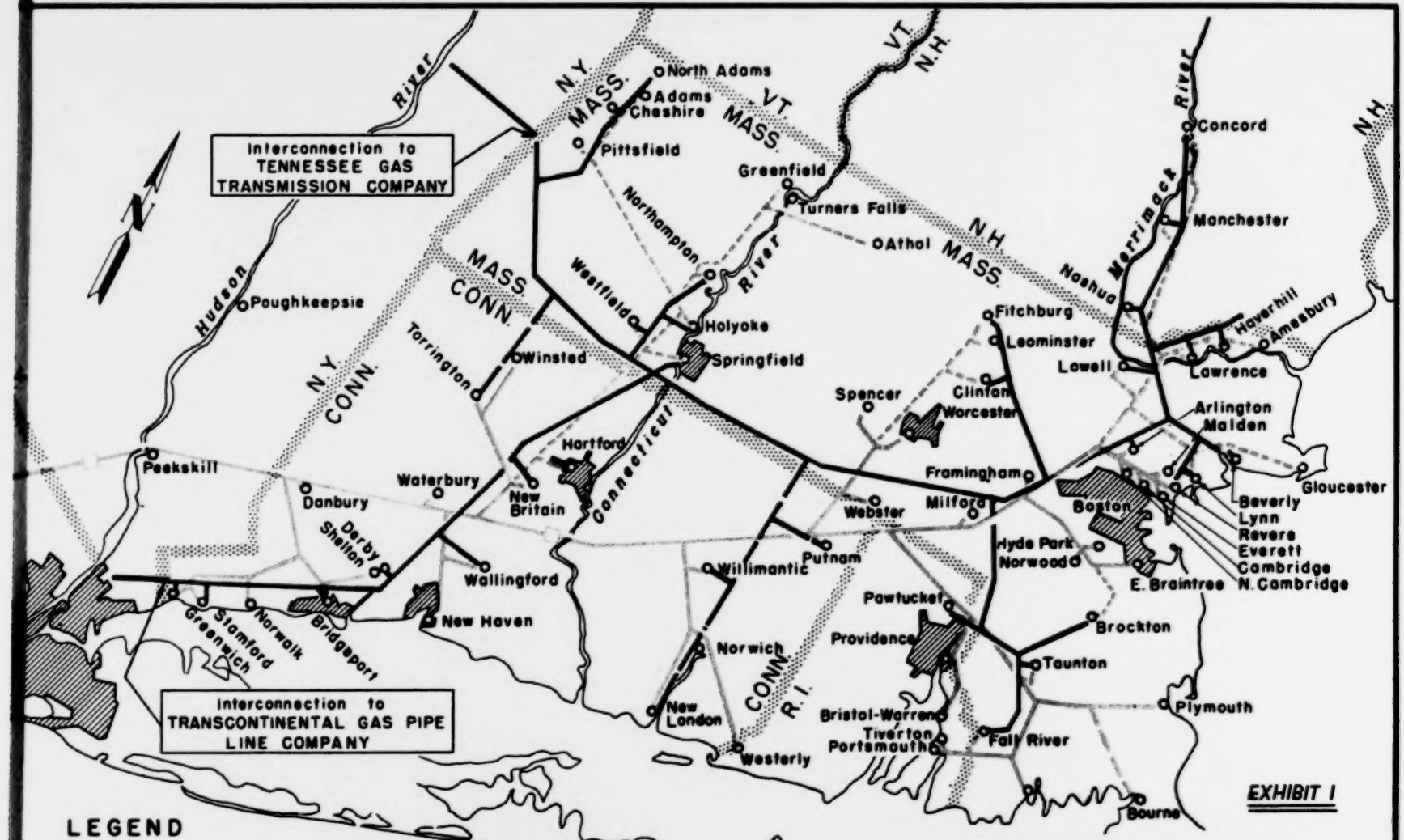


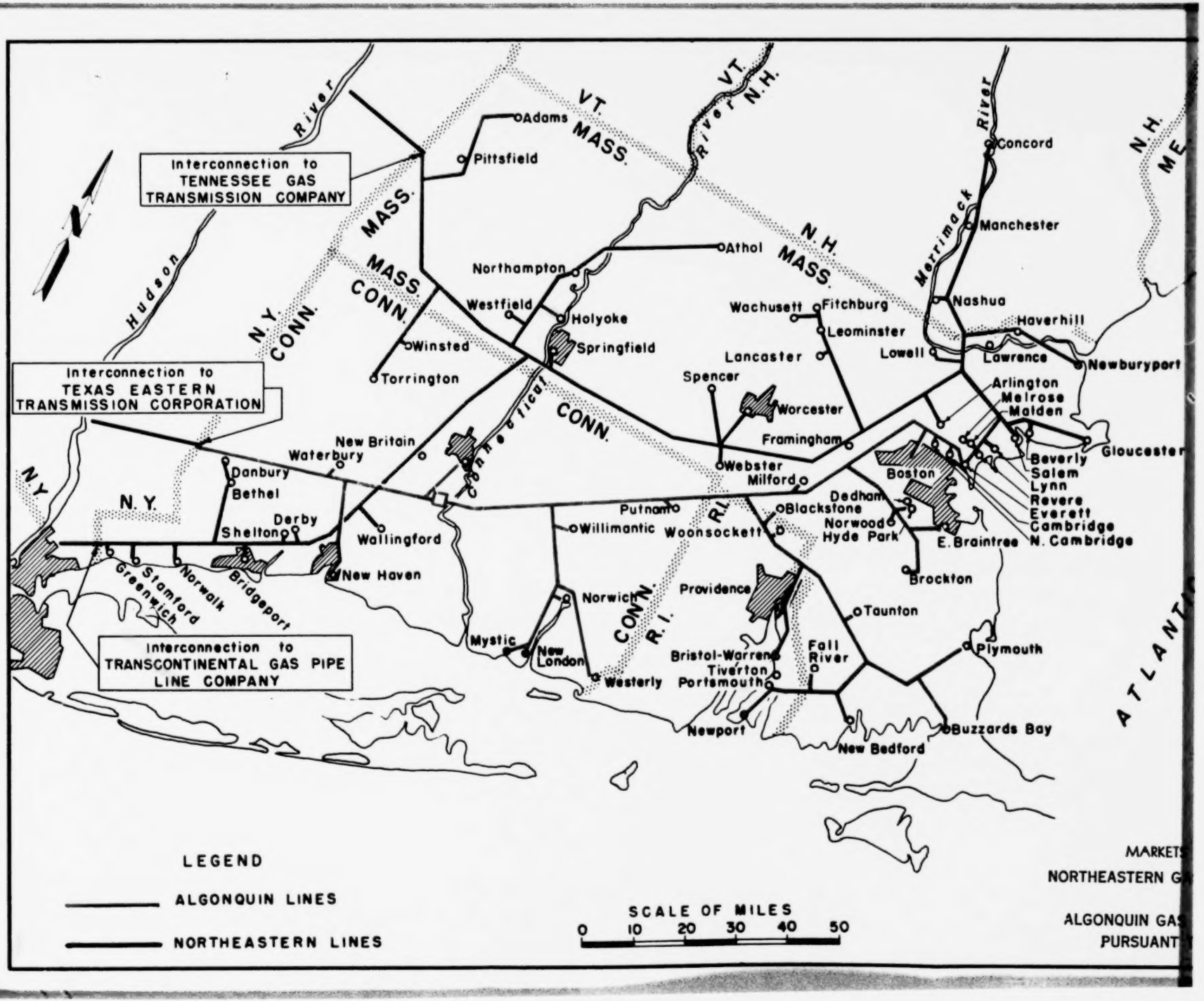
EXHIBIT I

COMPOSITE MAP

SHOWING PROPOSED SYSTEMS OF NORTHEASTERN GAS TRANSMISSION COMPANY AS SHOWN BY MAP ATTACHED TO ITS FIRST AMENDED APPLICATION FILED IN DOCKET NO. G-1267 ON MARCH 2, 1950

AND

ALGONQUIN GAS TRANSMISSION COMPANY AS SHOWN BY MAP ATTACHED TO ITS FIRST AMENDED APPLICATION FILED IN DOCKET NO. G-1319 ON MAY 1, 1950.



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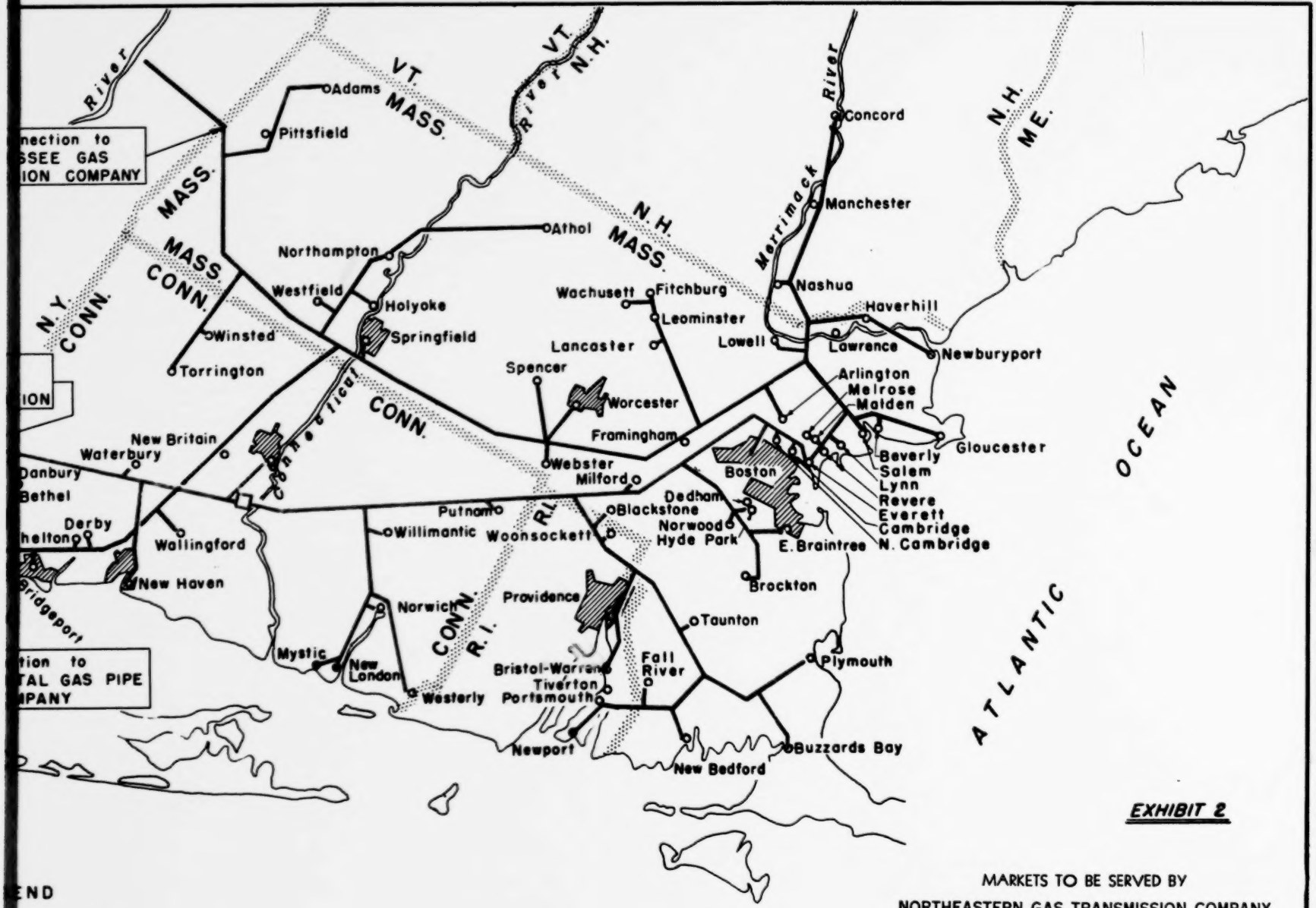

EXHIBIT 2

MARKETS TO BE SERVED BY
NORTHEASTERN GAS TRANSMISSION COMPANY
AND
ALGONQUIN GAS TRANSMISSION COMPANY
PURSUANT TO OPINION NO 202

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 172

FEDERAL POWER COMMISSION, *Petitioner*

v.

NORTHEASTERN GAS TRANSMISSION COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in the above-entitled cases on April 4, 1952.

OPINION BELOW

The opinion of the Court of Appeals (R. 1571-1587) is reported at 195 F. 2d 872.

JURISDICTION

The judgments of the Court of Appeals were entered on April 4, 1952 (R. 1587-1593). The jurisdiction of this Court is invoked under Section 19(b) of the Natural Gas Act (15 U.S.C. 717r(b)) and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether an applicant for a certificate of public convenience and necessity to authorize the construction and operation of a natural gas pipeline system is entitled to a hearing as a matter of right under Section 7(c) of the Natural Gas Act on an application filed after the Federal Power Commission has held extensive hearings and rendered a decision in consolidated proceedings on prior applications of both the applicant and a competitor which, taken together, sought authority to serve the same markets as the later application.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act of 1938, 52 Stat. 821, as amended, 56 Stat. 83, 15 U.S.C. 717 *et seq.*) are set forth in the Appendix, *infra*, pp. 25-31.

STATEMENT

This case involves several orders of the Federal Power Commission entered upon competitive applications for certificates of public convenience and necessity filed by Northeastern Gas Transmission Company (Northeastern) and Algonquin Gas Transmission Company (Algonquin) to provide natural gas service to the New England States.[1]

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[1] Related applications filed by Tennessee Gas Transmission Company, Transcontinental Gas Pipe Line Corporation Texas Eastern Transmission Corporation and United Gas Pipe Line Company, proposed suppliers of natural gas to

Upon Northeastern's petition for review, the court below set aside various Commission orders, including those dismissing in part, without prejudice, an application of Northeastern and granting a certificate of public convenience and necessity to Algonquin.

On August 24, 1949, Northeastern filed an application, amended on March 2, 1950, for a certificate to construct and operate a natural gas pipeline system to supply natural gas in Massachusetts, Rhode Island, New Hampshire and Connecticut to designated distributing companies and to "such communities as logically should be served by the pipeline system, and which are thus part of the potential market for that system" (R. 443a, 448a).

On January 24, 1950, Algonquin filed an application, amended on May 1, 1950, for a certificate to construct and operate a natural gas pipeline system to serve designated gas distributing utilities in New Jersey, Connecticut, Rhode Island and Massachusetts and "certain other customers who can be served economically by Applicant's pipeline system alone, all of which presently constitute the potential market for Applicant's proposed system" (R. 473a).

Northeastern and Algonquin, are described in the opinion below (R. 1572-1573). Since the issues involved depend upon disposition of the Northeastern and Algonquin applications, this petition, for purposes of simplicity, will discuss the case principally in terms of these applications, although the applications of their suppliers are also involved.

During the first half of 1950, hearings were held for thirty-six days on Northeastern's application in which Algonquin participated as an intervenor (R. 392a, 394a), and for seventeen days on Algonquin's application, in which Northeastern participated as an intervenor (R. 456a, 515a, 536a). The Commission then consolidated the Algonquin and Northeastern proceedings, and held 11 additional days of hearings, after which the record was closed except for proof of Algonquin's gas supply (R. 85, 169, 553a).[2]

Thereafter, on August 7, 1950, the Commission ordered its intermediate procedure omitted with respect to all matters involved in the consolidated proceedings except those relating to Algonquin's application for markets not sought by Northeastern (R. 81-83), and the presiding examiners certified to the Commission for decision the entire record in the consolidated proceedings (R. 619a, 624a). Northeastern affirmatively asserted that "both applicants have had a full hearing" with respect to the competitive aspects of their applications (R. 596a, 594a).

On October 4, 1950, in opinion No. 201, the Commission stated that "based on the market evidence

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[2] Algonquin was dependent for its gas supply on Texas Eastern which in turn depended on United. Algonquin's offer to prove its gas supply in the consolidated proceedings was denied by the presiding examiner on the ground that it should be presented first in the Texas Eastern proceeding. (R. 190-192, 615a-616a, 1262a-1265a, 1266a-1268a.)

presented on behalf of the entire New England area," "the public convenience and necessity requires adequate natural gas service" in that area (R. 86-87). It found, however, that the pending applications of Northeastern and Algonquin for permission to serve designated distributing companies without requesting "a certificate authorizing service to the entire area," resulted in "extensive and needless duplication and overlapping of facilities in the projects" so that granting either application would render the other project not feasible, and leave part of New England without natural gas service (R. 87).[3] Accordingly, the Commission found that neither application satisfied the statutory test of public convenience and necessity and suggested that "these applicants may present to the Commission without delay a proposal based upon evidence now of record which will meet the public demand and need for natural gas in New England in the early future" (R. 90). The Commission expressed the belief that "such a proposal can be submitted forthwith," but stated that it was "prepared to reopen the record for supplementary evidence if necessary" (R. 90).

Five days later, on October 9, 1950, Algonquin filed a supplement to its amended application, stating that it had been unable to obtain the cooperation of Northeastern to formulate a plan to meet

[3] The extensive duplication involved in the applications as filed is graphically shown by Exhibit No. 397 at R. 1383a.

the Commission's objections and proposing two alternatives to its pending application (R. 634a-635a). One called for a division of the whole New England market between Northeastern and Algonquin in accordance with a plan submitted in evidence by the Commission's staff, the other for authorization to Algonquin to serve the entire New England area based on evidence already in the record supporting this request (R. 636a-643a).

Northeastern, on the same day, submitted as its "Proposal" that the Commission grant its pending application and dismiss Algonquin's, "establish the six New England States as Northeastern's service area," and that "in a proceeding separate and removed from these proceedings" it would "undertake service for the entire area through its system" (R. 629a-630a).

One month later, on November 8, 1950, by its opinion No. 202 and accompanying order, the Commission authorized Northeastern to serve a part of the New England market, denied it authority to serve the remainder, and found "upon the basis of the record and findings herein, that the balance of the markets in New England as enumerated above, should be served by Algonquin upon a showing" of "an adequate supply of natural gas" (R. 111, 128, 129).[4] The Commission thus decided to

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[4] Correspondingly, Algonquin's application "insofar as it covers proposed service to communities and distributing companies herein authorized to be served by Northeastern

authorize two feasible projects for New England "with a minimum of duplication of facilities and a fair and equitable division of the market" (R. 107). To "secure to New England the benefits in part, at least, of an integrated natural gas system" it conditioned the issuance of certificates upon "the establishment of interconnections with, and agreements for emergency interchange of gas with, any natural gas system or systems serving the area at wholesale" (R. 111).

Northeastern accepted the certificate authorized in the order (R. 645a, 646a) and permitted the opinion and order to become final without seeking rehearing or review. After additional hearings, the Commission in its opinion and order No. 206 of February 27, 1951, found the existence of an adequate gas supply and granted Algonquin a certificate in accordance with its previous findings in No. 202 (R. 163, 178-179).[5]

On December 21, 1950, six weeks after the Commission's decision on dividing the New England market but before its issuance of a certificate of public convenience and necessity to Algonquin, Northeastern filed a new application for a certificate to extend its system "to all of the towns and

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Gas Transmission Company, be and the same is hereby denied" (R. 128-129).

[5] The Commission also granted certificates to United and Texas Eastern authorizing the sale and delivery of natural gas to Algonquin (R. 151, 176-178).

communities which Algonquin * * * has applied to this Commission for authority to serve and to a number of additional communities in Massachusetts, eastern New Hampshire and Maine to whom natural gas service has not heretofore been proposed" (R. 675a). With the exception of these "additional communities" the markets proposed to be served in Northeastern's new application "either were included in the certificate issued to Northeastern, * * * [were] denied [Northeastern] by the Commission's order issued November 8, 1950, * * * or * * * were reserved to Algonquin upon a showing by the latter * * * that it has an adequate gas supply therefor" (R. 64, 688a). Since, with minor exceptions, "all of the matters involved and issues presented" in Northeastern's new application "have been determined by the Commission's" prior decision, the new application was dismissed by order of January 10, 1951, as to all matters previously decided[6] "without prejudice to its refiling should the pending application of Algonquin be denied" (R. 65-66).[7] After the Com-

[6] The new aspects of Northeastern's application were ordered set for hearing at a date to be fixed by further order (R. 66).

[7] By orders of the same date, the Commission dismissed Northeastern's "supplement" in the Texas Eastern proceeding by which Northeastern sought to require Texas Eastern to sell natural gas required by Northeastern's new application and dismissed Tennessee and Northeastern from participation as intervenors in the further Algonquin proceedings relating only to gas supply (R. 80, 75-78).

mission's denial of petitions for rehearing (R. 185-209), Northeastern filed petitions to review the orders dismissing in part Northeastern's new application and granting a certificate to Algonquin (R. 1, 211).[8]

On review, the court below held that under Section 7(c) of the Natural Gas Act, Northeastern had a right to a hearing on its new application which had not been satisfied by the hearings already held because (1) neither Northeastern nor Algonquin at that time had presented a specific plan to service all of New England, (2) the allocation of markets which had not previously been sought by Northeastern was not properly before the Commission for decision because of the limited omission of its intermediate procedure, and (3) Northeastern's new application had been filed before a certificate had been granted to Algonquin. Accordingly, it set aside the Commission's orders dismissing Northeastern's new application and granting a certificate to Algonquin together with other related orders (R. 1571-1587).

REASONS FOR GRANTING THE WRIT

The holding of the court below that Northeastern was entitled to a hearing on its application to serve all of New England, although filed near the

[8] Other orders of which review was also sought will not be discussed separately since their disposition, for the most part, depends upon disposition of the basic issues presented by this petition.

conclusion of protracted and complex administrative hearings when all previously contested issues raised by long pending applications relating to the allocation of New England markets had been decided,[9] poses serious problems for administrative tribunals with respect to the fair and expeditious determination of applications for certificates of public convenience and necessity. The problem of natural gas service to the entire New England area had received extended and careful study by the Commission. But the court below, by a mechanical analysis of the pleadings and the Commission's orders, reached the conclusion that the precise question presented by the new application—service of all New England by a single company—had not been decided, that a certificate awarding markets sought by the new application had not yet been granted, and that the Commission never properly had before it the allocation of the markets previously sought only by Algonquin. It held, therefore, that a hearing on the new application was necessary as a matter of right before the Commission could proceed to a final determination of matters heard long before the new application had been filed. This holding represents both an unwarranted extension of *Ashbacker Radio Corp.* v.

[9] The adequacy of Algonquin's gas supply, the sole undecided issue in the consolidated proceedings, does not appear to have been contested. For this reason, the dismissal of the interventions of Northeastern and Tennessee is without significance.

F. C. C., 326 U. S. 327, and an undue restriction of *C. A. B.* v. *State Airlines*, 338 U. S. 572.

Under the reasoning of the court below, it would be possible for applicants, by reshaping the scope of their applications at any time before an order authorizing the issuance of a certificate of public convenience and necessity, to compel a succession of new hearings and thus indefinitely postpone administrative decision. The rigid mold into which the decision places administrative procedure impairs that flexibility, long regarded as the special virtue of the administrative process, which has made the use of specialized administrative tribunals particularly suited to dealing with the difficult and complex economic, social and technological problems of modern society.

The decision below not only imposes unjustifiable barriers to the exercise of sound discretion in the conduct of administrative proceedings, but also, by its stringent interpretation of statutory hearing requirements, may raise a question of the authority of agencies to prescribe rules for the orderly determination of applications for certificates or licenses where there may be competing interests.

1(a). Admittedly, Northeastern was entitled to a hearing on an application to provide natural gas service to New England, and the grant of a certificate to Algonquin without a hearing on Northeastern's application would be tantamount to the denial of such a hearing. *Ashbacker Radio Corp.*

v. *F. C. C., supra.* But the requirement of a new hearing on an application filed after extensive hearings on the same subject matter have been held, with the full participation of the applicant, goes far beyond the *Ashbacker* ruling—which held only that granting one of two mutually exclusive applications, without any hearings whatever, effectively deprived the other applicant of a hearing—and establishes conditions which can subject the administrative process in comparable situations to intolerable frustration and delay.

The extensive hearings which preceded both the denial of Northeastern's second application and the grant of a certificate to Algonquin satisfy the statutory requirement. The contrary holding of the court below is at odds with this Court's decision in *Civil Aeronautics Board* v. *State Airlines,* 338 U. S. 572, which makes clear that the substance, rather than the form, of the matter presented for administrative consideration is controlling. In that case, the Civil Aeronautics Board consolidated into one area proceeding and held hearings on some 45 route applications of 25 airlines. After making appropriate findings, it authorized certificates of convenience and necessity to Piedmont Aviation, Inc. to serve several new routes in the area for which it had not applied. State Airlines complained that it had been denied the hearing required by the Civil Aeronautics Act because Piedmont had never applied for the particular routes

certified. The Court upheld the Board's action, stating (338 U. S. 577-578)

> We are convinced that the Board, in awarding routes varying from those specifically detailed in Piedmont's application, has not departed from the congressional policy hinging certification generally on application procedures. While the routes sought by Piedmont did differ markedly from those awarded, they were all in the general area covered by the consolidated hearings. All twenty-five applicants had asked for routes somewhere in the area, and many of these routes overlapped. In such an area proceeding it would exalt imaginary procedural rights above the public interest to hold that the Board is hamstrung by the lack of foresight or skill of a draftsman in describing routes.[10]

The proceedings held in the present case clearly satisfy the standards established in the *State Airlines* case. At the conclusion of the separate and the consolidated hearings on the Northeastern and Algonquin applications, a voluminous record made upon a full hearing was before the Commission on rival applications to supply the New England area with natural gas.

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[10] The pertinent provisions of Section 401(d)(1) and (2) of the Civil Aeronautics Act, under construction in that case, are virtually identical with the pertinent provisions of Section 7(e) of the Natural Gas Act.

On the basis of this record, the Commission on October 4, 1950, found that the applications of Northeastern and Algonquin, as submitted, did not meet the test of "public convenience and necessity," and invited them to submit "without delay" and "forthwith" a plan "based on evidence now of record" to "meet the public demand and need for natural gas in New England." On October 9, 1950, Algonquin made alternative proposals in the pending proceeding relating to service of the entire New England area, but Northeastern proposed only that it would "immediately" submit a further plan "in a proceeding separate and removed from these proceedings" while requesting the Commission to allocate the entire New England area to Northeastern, grant its pending application, and dismiss Algonquin's.

At that time, therefore, the Commission had before it the two applications of Northeastern and Algonquin which in specific terms, in combination, requested all the markets involved in the portion of Northeastern's new application which the Commission refused to entertain. In addition, both Northeastern and Algonquin had requested in general terms the markets logically related to those specifically requested. It had the proposal of the Commission's staff for a division of these markets between Northeastern and Algonquin in a manner similar to, but not identical with, the division eventually adopted. It also had Northeastern's

further proposal to establish all of New England as its service area and Algonquin's supplemental proposal, in the alternative, that the New England market be divided between Northeastern and Algonquin as suggested by the Commission's staff, or that Algonquin be authorized to serve the entire New England area. Thus the Commission had presented to it not only the question of dividing the New England markets between the two applicants but also of allocating it entirely to Northeastern—the precise question posed by Northeastern's subsequent application—or to Algonquin.

When it divided the New England markets between the rival applicants in opinion and order No. 202, it did so on the basis of evidence in the record on "operating expenses, anticipated revenues, proposed rates, and all other matters relating to economic feasibility" of the systems proposed by the applicants after making the necessary adjustments for the two systems contemplated by the Commission's order (R. 108-111).[11]

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[11] The Commission had before it testimony and documentary evidence presented by its staff witnesses showing a division of the markets between Northeastern and Algonquin closely approximating the division adopted by the Commission in Opinion No. 202 and order of November 8, 1950. The markets assigned to each system by the Commission differed from those suggested by staff witnesses in only two respects. The staff pipeline system for Northeastern had only Tennessee as a source of supply, whereas the Commission expanded the Northeastern system by including Transcontinental as a second source of gas supply and assigned to

In accordance with its expressed intent in No. 201, the Commission was obviously determining the disposition of the entire New England market when it issued opinion and order No. 202. It found "that the Northeastern project as herein authorized can be justified and certificated on the present record," and "that the remaining markets in New England will provide an economic system for Algonquin which will be in the public interest." It, therefore, decided to grant to Northeastern a "portion of its application and authorize it to serve a part of the market and deny to it the remainder." It also concluded, "that the balance of the markets in New England as enumerated above, should be served by Algonquin upon a showing by Algonquin that it has an adequate supply of natural gas to serve such markets," and denied to Algonquin other markets for which it had applied (R. 111, 125-129).

Northeastern (1) various markets in Connecticut contiguous to the pipeline which provided the link between Northeastern's main system and the point at which Transcontinental would make delivery, and (2) Worcester Gas Light Company in Massachusetts, thus providing markets to utilize the full volume of natural gas to be received by Northeastern from its two gas suppliers. Correspondingly, the markets thus assigned to Northeastern by the Commission were taken away from the Algonquin system as designed by staff witnesses. No market assigned to Northeastern by staff witnesses was taken away by the Commission in opinion No. 202 and order. (R. 1282(31)a-1282(33)a, 1282(36)a-1282(37)a; Exs. 408, 409, 412, 413 at R. 1051a-1052a, 1059a-1062a.)

The markets denied to Northeastern and assigned to Algonquin are the same markets involved in the dismissed application (R. 64-65, 66, 728a). It is clear, therefore, that Northeastern had already had a hearing with respect to the subject matter of its second application. Surely, the statute does not entitle it to another hearing on this application because it presented the problem to the Commission in a different form.[12]

The effectiveness of the Commission's determination is not affected by the fact, stressed by the court below, that the Commission's order waiving its intermediate procedure did not apply to the markets designated in Algonquin's application

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[12] The dismissed portion of Northeastern's new application sought authority to serve 26 markets. 17 of these (Brockton Gas Light Co., Taunton Gas Light Co., Fall River Gas Works Co., Buzzard's Bay Gas Co., Norwood Gas Co., Blackstone Valley Gas & Electric Co., Narragansett Elec. Co. [Westerly & Bristol-Warren], Connecticut Power Co. [New London], Connecticut Light & Power Co. [Waterbury, New Haven, Willimantic, Putnam], New Haven Gas Light Co., Mystic Power Co., Hartford Gas Co., Norwich Gas & Elec. Dept.) were markets requested by Northeastern in its first application, which were specifically denied by the Commission's order in No. 202 (R. 129). The remaining 9 markets (Cambridge Gas Light Co., Dedham & Hyde Park Gas Co., New Bedford Gas & Edison Light Co., Plymouth Gas Light Co., Milford Gas Light Co., Boston Consolidated Gas Co., Old Colony Gas Co., Providence Gas Co., Newport Gas Light Co.) were requested in Algonquin's application and not previously sought by Northeastern. They formed a part of the system which the Commission in No. 202 found should be awarded to Algonquin (R. 109-111).

which Northeastern did not seek to serve. Whatever other effects this omission might have, it would hardly seem to buttress Northeastern's claim to a hearing on a new application.

Before the Commission issued its opinion and order No. 201, the presiding examiners had certified to the Commission the entire record in both proceedings (R. 619a, 624a). The Commission's actions thereafter were taken on the entire record (R. 85-86, 87, 89, 107). It is clear that the Commission intended by its order waiving the intermediate decision procedure to bring before it all competitive issues involved in the applications of the two companies (R. 83). That the Commission understood that it had done so and that these competitive issues required a resolution of the question of service to the entire New England market is clearly stated in its opinion No. 201 (R. 85-86).

Moreover, Northeastern had full opportunity through its intervention in the Algonquin proceeding and in the subsequent consolidated proceeding to make its case for serving these markets, which it apparently did not attempt to do. It may therefore be deemed to have waived any claim to serve them. Their subsequent award to Algonquin, therefore, furnishes no basis for complaint. Certainly, in these circumstances, Northeastern can assert no justifiable right to be heard on an application to serve them which was filed for the first time after the Commission had found that they

could best be served by Algonquin. Algonquin would seem to be the only party entitled to complain of the Commission's failure to waive the intermediate procedure with respect to these markets, since one of them, Worcester, was awarded to Northeastern.

In any event, if the Commission's findings in opinion and order No. 202 were for any reason improper, Northeastern's remedy was to have them overturned by following the exclusive statutory procedure and not by collateral attack. See *Federal Power Commission* v. *Pacific P. & L. Co.*, 307 U. S. 156, 159. Northeastern, however, permitted that opinion and order to become final without filing an application for rehearing or seeking judicial review, under Section 19 of the Act, of the Commission action denying it requested markets. With the door thus closed to any attack on the certificate granted to it, Northeastern filed a new application for a certificate of public convenience and necessity to serve the very markets in New England which the Commission had just denied to Northeastern and had determined should be served by Algonquin upon a showing of an adequate gas supply.[13] A new application at this stage of the

[13] Additionally, the new application sought authority to serve seven distributing companies which had not been covered by opinion No. 202 and order (R. 64-65, 673a-686a). Service to these companies represented 6% of the market requirements of all the gas distributing companies involved in the application (R. 773a).

proceeding comes too late to stay the Commission's hand in passing upon prior applications for providing service to the New England area. Compare *Seaboard & Western Airlines* v. *Civil Aeronautics Board,* 181 F. 2d 777 (C.A.D.C.). The attempt to reopen the decision of the Commission in No. 202 with respect to the division of the New England market by this device amounts to a collateral attack on that decision without compliance with Section 19(a) and (b), making the filing of an application for rehearing within 30 days and a petition for review within 60 days absolute prerequisites to judicial review. *Louisville Gas & Electric Co.* v. *F. P. C.,* 129 F. 2d 126 (C.A. 6). Certainly to the extent that Northeastern was denied markets, it was a final and reviewable order. The Commission's designation of an economically feasible project for Algonquin was also ripe for review at this time since the markets denied to Northeastern comprised an integral part of this project and the denial of these markets to Northeastern was clearly reviewable.

The policy considerations underlying the statutory time limits were well summarized by the Commission (R. 203):

> Northeastern cannot accept the benefits of our Opinion No. 202 and accompanying order, fail to exercise its right to apply for rehearing or appeal as provided in the Natural Gas Act, accept in writing the privileges conferred

by the opinion and order, and then collaterally attack a portion thereof in this manner. If such action were permitted hearings might continue *ad infinitum* and regulation which was designed to protect the consuming public would fail of its purpose and become a time consuming but empty process.

(b). By its ruling that Northeastern was entitled to a hearing that it did not have, the court below may also raise a question as to the validity of agency regulations promulgated to provide an orderly procedure for hearings in cases where there may be competing applications for licenses or certificates of necessity. For example, with respect to applications for radio licenses, the Federal Communications Commission has required "an application that is mutually exclusive with another application or applications already designated for hearing" to be filed "at least 20 days before the date on which the hearing on the prior application or applications is scheduled" or be subject to dismissal and eligible for refiling only after withdrawal of or a decision on the prior application. 47 CFR § 1.387(b)(3).[14] If the statutory hearing requirement compels the administrative agency to afford a hearing at any time before final decision on a competitive application, as held below, a question occurs whether the

[14] See also a proposed rule of the Federal Power Commission, 17 Federal Register 4390, May 14, 1952.

agency possesses authority to modify this right by regulation. Certainly, administrative agencies should be permitted to provide an orderly procedure for hearing what may be extremely complicated questions where there is provision for notice and an adequate opportunity for hearing. There is nothing in the decisions of this Court which suggests that this opportunity must remain open until all proceedings are at an end.

2. The fact that the Commission by its opinion and order No. 202 had not decided the adequacy of Algonquin's gas supply and granted it a certificate did not qualify the character of the hearing with respect to determinations actually made. The requirement of the decision below that all questions be held open until all are finally decided unnecessarily encumbers administrative proceedings and is at variance with rulings of this Court. Determination of the order in which particular issues should be decided is a matter for administrative discretion. *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 508-509. "A hearing may be a full one, although the evidence introduced does not enable the tribunal to dispose of the issues completely or permanently; and although the tribunal is convinced, when entering the order thereon, that, upon further investigation, some changes in it will have to be made." *New England Divisions Case*, 261 U. S. 184, 201. This Court has recognized that administrative

agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 143.

A final order entered at an interim stage of the proceedings has been upheld where, "while the proceedings were not ended by the interim order, the companies had full opportunity to offer all their evidence both direct and in rebuttal, and full opportunity to cross-examine every witness offered by both the Federal Power Commission and the Illinois Commerce Commission." *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 583-584. See also *Federal Communications Commission* v. *WJR, The Goodwill Station, Inc.*, 337 U. S. 265; *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 525; *Kuhn* v. *Civil Aeronautics Board*, 183 F. 2d 839, 842 (C.A. D.C.); *National Labor Relations Board* v. *Air Associates, Inc.*, 121 F. 2d 586, 591 (C. A. 2). Withholding the grant of Algonquin's certificate of public convenience and necessity until its gas supply had been established, therefore, did not enlarge Northeastern's procedural rights with respect to the question of the allocation of markets which had in fact been decided.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General

BRADFORD ROSS,
General Counsel,
Federal Power Commission.

JULY, 1952

APPENDIX

The pertinent provisions of the Natural Gas Act of 1938, 52 Stat. 821, as amended, 56 Stat. 83, 15 U.S.C. 717 *et seq.*, are as follows:

> SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.
>
> * * * * * * * *

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set

the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice of hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the

whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

* * * * * * * *

SEC. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after

the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper.

The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

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IN THE

Supreme Court of the United States

Nos. 70 and 172, October Term, 1952

Algonquin Gas Transmission Company and Texas Eastern Transmission Corporation, *Petitioners,*

v.

Northeastern Gas Transmission Company, Tennessee Gas Transmission Company, Federal Power Commission, Blackstone Valley Gas and Electric Company and Fall River Gas Works Company, *Respondents.*

Federal Power Commission, *Petitioner,*

v.

Northeastern Gas Transmission Company, et al., *Respondents.*

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR NORTHEASTERN GAS TRANSMISSION COMPANY, TENNESSEE GAS TRANSMISSION COMPANY, BLACKSTONE VALLEY GAS AND ELECTRIC COMPANY, AND FALL RIVER GAS WORKS COMPANY IN OPPOSITION.

Opinions Below.

The opinions and orders of the Federal Power Commission are as follows: order of August 4, 1950 (R. 81-83); Opinion No. 201, dated October 3, 1950 (R. 84-93); Opinion No. 202 and order dated November 4, 1950 (R. 94-133);

three (3) orders dated January 10, 1951 (R. 61-74, 75-78, 79-80); Opinion No. 206 and order dated February 26, 1951 (R. 134-184); and Opinion No. 208 and order dated March 1, 1951 (R. 185-210, 276-281).

The opinion of the United States Court of Appeals for the Third Circuit (R. 1571-1587) is reported at 195 F. 2d 872.

Jurisdiction.

The judgments of the Court of Appeals were entered on April 4, 1952 (R. 1587-1593). The petitions for certiorari were filed on May 17, 1952 and July 2, 1952. The jurisdiction of this Court is invoked under Section 19(b) of the Natural Gas Act (15 U.S.C. 717r(b)) and 28 U.S.C. 1254(1).

Statute Involved.

The pertinent provisions of the Natural Gas Act of 1938, 52 Stat. 821, as amended, 56 Stat. 83 (1942), 15 U.S.C. 717 *et seq.* are set forth in the Appendix, *infra*, pp. 17-20.

Questions Presented.

Northeastern Gas Transmission Company (Northeastern) and Algonquin Gas Transmission Company (Algonquin) each applied for authority to bring natural gas to certain, but not all, of the distributing companies in Massachusetts, Connecticut and Rhode Island. In the consolidated proceedings on these applications, the Commission, in its first opinion, found that all of the distributing companies should be served by a single pipeline system since this would avoid the duplicate facilities and unnecessary costs of two systems. The Commission adhered to this view in its second opinion in which it authorized Northeastern to serve thirty-seven (37) of the companies and denied it authority to serve the other seventeen (17) companies covered by its application since the Commission found that the latter would be required to support "a project" to serve nine (9) compa[illegible]es not covered by such

application. Promptly thereafter, Northeastern filed an application to expand its facilities as thus authorized so that it could serve all of the companies through a single system and Northeastern requested that this application be consolidated with the hearings on Algonquin's application which were still pending. The Commission dismissed Northeastern's second application without a hearing—such dismissal being without prejudice to refiling in the event Algonquin's application were later denied. Upon the basis of such dismissal, the Commission terminated Northeastern's intervention in the then pending hearings on Algonquin's application, thereby denying Northeastern the opportunity to be heard in opposition to Algonquin's application, which the Commission thereafter granted. The questions are:

(1) Whether, as the lower court held, the Commission erred in denying Northeastern's second application without the hearing required by the Act?

(2) Whether, as the lower court held, Northeastern, *in any event*, was entitled to be heard as an intervenor in opposition to Algonquin's application?

Statement.

Northeastern filed an application on August 24, 1949 (R. 327a) which, as amended on March 2, 1950 (R. 442a), sought a certificate to construct and operate a pipeline to supply natural gas to forty-six (46) designated distributing companies in New England, which did not include the ten (10) companies in Massachusetts and Rhode Island which had executed contracts with Algonquin (R. 87, 413a).

Algonquin filed an application on January 24, 1950 (R. 409a) which, as amended on May 1, 1950 (R. 471a), sought a certificate to construct and operate a pipeline to supply natural gas to certain designated distributing companies in New England, which did not include twenty-two (22) of

the companies in Massachusetts and Rhode Island (R. 88).

During the first half of 1950, hearings were held on Northeastern's application in which Algonquin participated as an intervenor (R. 394a) and hearings were held on Algonquin's application in which Northeastern participated as an intervenor (R. 456a). The applications were then consolidated for hearing (R. 550a).[1]

The hearings on Northeastern's application having been completed, although the hearings on Algonquin's application were still pending, the Commission, upon motion of its staff counsel (R. 563a), waived the intermediate decision procedure with respect to "all the issues presented and matters involved" in the application of Northeastern and with respect to the issues presented and matters involved in Algonquin's application "to the extent *only* that Algonquin * * * *presently* proposes to supply natural gas to the communities and to the distributing companies *presently* proposed to be served by Northeastern" (R. 81-83). (Italics supplied.)[2]

Commission's Opinion No. 201.

After briefs had been filed, the Commission issued its first opinion (No. 201) in these matters, in which it found that "the public convenience and necessity requires adequate natural gas service" in the New England area (R. 86-87). The Commission then pointed out that Northeastern and Algonquin had each applied for authority to serve certain designated distributing companies and that neither had "requested a certificate authorizing service to the entire area;" that the two projects involved "extensive

[1] The proceedings before the Commission also involved the applications of Tennessee Gas Transmission Company (Tennessee) and Transcontinental Gas Pipe Line Corporation (Transcontinental) for authority to supply gas to Northeastern and the application of Texas Eastern Transmission Corporation (Texas Eastern) to supply gas to Algonquin and the application of United Gas Pipe Line Company (United) to supply such gas to Texas Eastern. These related applications are described in the opinion below (R. 1572-1573) and in the interest of simplicity this brief will discuss the issues in terms of the applications of Northeastern and Algonquin.

[2] Italics are supplied throughout this brief unless otherwise indicated.

and needless duplication and overlapping of facilities" and "would place an unjust and unnecessary financial burden upon the gas consumers in New England;" and that "the issuance of a certificate to either as applied for will render the other applicant's project infeasible" with the result that a part of New England would be deprived of natural gas (R. 87-89).[3] The Commission then suggested that the applicants "present to the Commission without delay a *proposal* based upon evidence now of record which will meet the public demand and need for natural gas in New England in the early future" (R. 90). While expressing the belief that "such a proposal can be submitted forthwith," the Commission stated that it was "prepared to reopen the record for supplementary evidence if necessary" (R. 90).

Five days later, on October 9, 1950, Northeastern submitted a "proposal" in which it requested that the Commission grant its then pending application on which hearings had been completed since August 5, 1950 and deny Algonquin's application (R. 627a)[4] Northeastern then stated that it would immediately, in a separate proceeding, undertake service to the entire area through its system which could be expanded at a minimum cost (R. 629a-630a).[5] While Opinion No. 201 did not require that the applicants submit a joint proposal,[6] Northeastern explained that it was unwilling to enter into any arrangement with

[3] In this connection the Commission listed the ten (10) distributing companies which were not covered by Northeastern's application because they had executed contracts with Algonquin and the twenty-two (22) distributing companies in Massachusetts and Rhode Island, as well as the five (5) companies in New Hampshire, which were not covered by Algonquin's application (R. 87-88).

[4] Denial of Algonquin's application would make the ten (10) distributing companies which had contracted with Algonquin available to Northeastern as potential customers.

[5] In such proposal Northeastern also suggested that the Commission establish the six New England states as its "service area" under Section 7(f) of the Act, although the Commission, as hereinafter shown, *infra*, pp. 13-14, has *never* made a "service area" determination in *any* proceeding.

[6] The Commission subsequently pointed out that Opinion No. 201 had afforded the applicants the opportunity to submit proposals either "jointly *or individually*" (R. 106).

Algonquin since it could not undertake the responsibility "for developing the New England natural gas market under the handicaps inherent in a divided corporate control where management will be dictated to or harassed by *divergent and competing fuel interests*". (R. 628a).[7] On the same day, October 9, 1950, Algonquin filed a supplement to its application in which it submitted two alternatives, including a request for authorization to serve the entire New England area (R. 632a).

Commission's Opinion No. 202.

Without any further proceedings, the Commission, a month later, on November 8, 1950, issued its second opinion (No. 202) and accompanying order (R. 94-133).

In said opinion the Commission adhered to its previously expressed views with respect to the greater desirability of a single pipeline system in New England (R. 111). The Commission then stated that "in view of the limitations upon our authority and the unquestioned desirability of providing service which can be rendered to some parts of the area in the near future," it had decided to authorize a portion of Northeastern's application on which hearings had been completed provided it could be assured that "*a project* to serve the remainder of the area is not thereby rendered infeasible" (R. 107). In so doing, the Commission pointed out (R. 109) that the record in the Algonquin proceeding "has not been closed and we cannot at this time take action with respect to Algonquin's application except as provided" in the order of August 4, 1950 waiving the intermediate decision procedure on that application to the extent only that such application covered distributing companies which were also covered by Northeastern's

[7] One of the three organizers of Algonquin and one of its principal stockholders is Eastern Gas and Fuel Associates (R. 475a, 479a) which is one of the nation's largest producers of bituminous coal for commercial purposes. The National Coal Association and United Mine Workers intervened in these matters (R. 75, 395a) "*opposing* the introduction of natural gas into New England" (R. 86). Cf. *National Coal Association* v. *F. P. C.*, 191 F. 2d 462.

application. The Commission then stated that the remaining markets—other than those which Northeastern was being authorized to serve—would assure an economically feasible project (R. 109). While the Commission also stated (R. 111) that it was "of the opinion" that these remaining markets "should be served by Algonquin" if Algonquin thereafter showed that it had an adequate supply of gas, the Commission did not state nor imply that Northeastern would be precluded from thereafter applying for authority to expand its facilities so that the entire New England area would be served by a single pipeline system. On the contrary, the Commission specifically stated (R. 107) that it was not "precluding the ultimate development of *a system* or systems better adapted to the requirements of New England than those proposed initially by either applicant."

Northeastern accordingly did not have any objection to the foregoing action and promptly advised the Commission that it acccepted the certificate which authorized it to serve thirty-seven (37) designated distributing companies, including one (Worcester Gas Light Company) which was not covered in its application (R. 645a).[8]

Hearings on Algonquin's application resumed on December 18, 1950 with Northeastern participating as an intervenor. In these hearings Algonquin introduced evidence substantially revising its previous estimates with respect to market requirements and gas supply (R. 161). The hearings were then recessed to resume on January 15, 1951 *without any limitation* as to the scope of the further hearings in which Northeastern planned to introduce evidence showing that Algonquin's application should be denied (R. 792a).

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[8] There was no indication that Northeastern, in accepting the certificate issued to it, would be thereby acquiescing in the future issuance of a certificate to Algonquin. Moreover, it is clear from the Commission's Opinion No. 202 that the sole purpose of the condition requiring Northeastern's acceptance of the certificate was to obtain Northeastern's agreement to establish interconnections and enter into agreements for the emergency interchange of gas with "*any* natural gas systems or systems serving the area at wholesale" (R. 111).